Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

NO. ~~79~~ -1100

WILLIAM J. RIALS,

*Petitioner,*

V.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA,
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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

## BRIEF OF PETITIONER

The Petitioner, WILLIAM J. RIALS, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

Petitioner was convicted on December 14, 1978 in the United States District Court for the Northern District of Georgia. The United States Court of Appeals for the Fifth Circuit rendered a per curiam decision affirming the District Court without opinion on December 14, 1979. (Appendix A, *infra*).

## JURISDICTION

Jurisdiction of this appeal is grounded in a December 14, 1979 decision of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Northern District of Georgia. The statutory provision conferring jurisdiction for this appeal is 28 U.S.C. Section 1254.

## QUESTION PRESENTED FOR REVIEW

WHETHER THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR MISTRIAL AFTER WRONGFULLY ADMITTING THE TESTIMONY OF TWO GOVERNMENT WITNESSES AND A NUMBER OF GOVERNMENT EXHIBITS INTO EVIDENCE IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL.

## CONSTITUTIONAL PROVISION INVOLVED

Sixth Amendment, United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.



## STATUTES INVOLVED

18 U.S.C. Section 371, provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

26 U.S.C. Section 7201, provides:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

## PREFATORY STATEMENT

All references to the record in this case, which record is comprised of four volumes, numbered in Arabic nuerals will appear as the Arabic number followed by the page reference, e.g., "V.1:12."

## STATEMENT OF THE CASE

Petitioner was indicted on October 3, 1978. The indictment charged Petitioner with one count of conspiring to evade Federal income tax laws in violation of 18 U.S.C.

Section 371 (Count 1) and of aiding and abetting the evasion of Federal income tax laws in violation of 26 U.S.C. Section 7201 (Counts 2, 3, 6 and 7). Petitioner entered a plea of not guilty on October 13, 1978. Petitioner was to be tried with co-defendant, Stanley E. Galkin who was charged with one count of conspring to evade Federal income tax laws in violation of 18 U.S.C. Section 371 (Count 1) and of aiding and abetting the evasion of Federal income tax laws in violation of 26 U.S.C. Section 7201 (Counts 2, 3, 4 and 5). However, co-defendant Galkin entered a negotiated plea of guilty as to Counts 1, 2 and 4 on December 4, 1978. Petitioner proceeded to trial on December 11, 1978. On December 14, 1978, the jury reached a verdict of guilty as to all Counts. Petitioner was sentenced on January 19, 1978. A Notice of Appeal was timely filed and a brief was submitted in support of said Notice. On December 14, 1979, the Fifth Circuit Court of Appeals affirmed Petitioner's conviction without written opinion in *United States v. Rials*, No. 79-5096.

Petitioner respectfully submits the following chronology with respect to the issue presented here:

1. Petitioner, President of SEMAC INDUSTRIES, a corporation which bought and sold heavy construction machinery, was charged in Count One of an indictment with conspiring to evade Federal income tax laws in violation of 18 U.S.C. Section 371 and in Counts Two, Three, Six and Seven, with aiding and abetting the evasion of Federal income tax laws in violation of 26 U.S.C. Section 7201.

2. The trial commenced on December 11, 1979. The evidence showed that in February, 1973, Machinery Buyers Corporation (hereinafter referred to as "Machinery Buyers") changed its name to SEMAC Industries (hereinafter referred to as "SEMAC") (V.1:69). Petitioner was President of SEMAC, Stanley Galkin was Secretary, Ray Strickland was Vice-President and Arthur Cates was Vice-President (V.1:69). In early 1973, Machinery Buyers, known as SEMAC, was negotiating for the purchase of road building equipment in Puerto Rico (V.1:69). On February 8, 1978, two Puerto Rican companies contracted to sell certain pieces of machinery equipment to Machinery Buyers (V.2:71). An agreement was also entered into whereby monthly payments were to be made by the Puerto Rican companies to Machinery Buyers, if the machinery was not available for delivery by the delivery dates (V.2:72).



3. The government attempted to show through the testimony of two immunized witnesses, Arthur Cates and Ray Strickland, that the money received from the Puerto Rican companies would be disbursed to SEMAC's corporate officers and used for "fun" money (V.2:19) (V.2:54). The government also attempted to show through the immunized testimony of Cates and Strickland that in the event they were caught with the money, they were to say that it was for a finder's fee to an anonymous individual, Gordon Fleming (V.2:22) (V.2:56).

4. On the morning of December 13, 1978, the third day of trial, Petitioner's counsel asked the court to conduct a preliminary inquiry, outside the presence of the jury, concerning the admissibility of the testimony of special agent Benjamin McMakin setting forth statements purportedly made to him by SEMAC's attorney, Michael Ginsberg (V.3:3). It was the government's contention that the statements made by Ginsberg to McMakin were the vicarious admissions of Rials since Ginsberg was acting as

attorney and agent for SEMAC during a January 30, 1976 meeting.

5. Bernard McMakin, special agent with the Criminal Investigation Division of the I.R.S. in Atlanta, Georgia, testified during this preliminary inquiry. McMakin was present at the January 30, 1976, meeting in the law offices of attorney Ginsberg (V.3:25). McMakin explained that subsequent to serving an I.R.S. summons on Petitioner for corporate books and records, he received a phone call from Ginsberg, who advised that he was representing SEMAC (V.3:26). McMakin informed Ginsberg that before the I.R.S. would talk to him about what was going on, a power of attorney form was needed from Ginsberg (V.3:36). Shortly thereafter, Ginsberg mailed McMakin a power of attorney form signed by Ginsberg, two other attorneys and Rials, indicating that Ginsberg and the other lawyers were representing SEMAC during the I.R.S. investigation (V.3:26). McMakin met Ginsberg at his office on January 30, 1976, to explain to him why the I.R.S. was investigating SEMAC (V.3:26). McMakin stated that from time to time during the January 30th meeting, Ginsberg excused himself to get information from Rials and a certified public accountant, Mr. Mills, who were sitting in another room (V.3:27).

6. Mills also testified at this preliminary inquiry (V.3:13). Mills, Jacobes (an associate of Mills) and Rials were present in one room of the Ginsberg law offices on January 30, 1976, while Ginsberg was in another room with special agent McMakin (V.3:14). Ginsberg asked Mills to be at the meeting, to answer any questions that might be asked pertaining to SEMAC's books and records (V.3:16). Ginsberg would come in the room with questions, and



Mills and his associate "would look up the answers" (V.3:17).

7. The government planned to show by McMakin's testimony that statements allegedly made by Ginsberg on behalf of Rials, showed that receipt of monies from the Puerto Rican companies was not reported on the corporate books or tax returns and that disbursement of the monies and finder's fees paid to Gordon Natrass and Gordon Fleming, were not reported either (V.3:41). McMakin would also testify that Natrass would deny receiving payments of the finder's fees and that there would be no way to locate Gordon Fleming (V.3:42). Natrass's testimony would show that he never received finder's fees in cash from anyone connected with SEMAC (V.3:42).

8. Petitioner's counsel strenuously objected to the introduction of this evidence on the ground that there was no indication in the record that Rials ever knowingly and intelligently authorized Ginsberg to make a statement on his behalf, that Ginsberg was not an authorized representative of Rials in his individual capacity and that the record was insufficient to establish that any statement by Ginsberg came from Rials as opposed to Mills or any other individual (V.3:46). Nevertheless, the Court allowed the testimony of McMakin and Natrass to be heard by the jury (V.3:54).

9. Later that afternoon, however, the Court stated:

> All right, let me tell you . . . that I have thought a great deal since I left this morning about Mr. McMakin's testimony and Mr. Natrass as it relates to the vicarious admission, or whatever you want to call it, of Mr. Rials through the statements made by Mr. Ginsberg.

I am convinced, the more I think about it, that there is no way in the world that that evidence should be admissible and I have to try to figure out some way to instruct the jury to disregard it (V.3:107).

* * * *

It bothers me, and I have thought about it a great deal since this morning. In fact, I almost stopped Ms. McKenzie when she put Natrass on the stand, and I don't know why I didn't do it. It may be because I took some medication last night, I was coming down with a cold, it's a powerful antihistamine, they usually wear off by morning but this one I can still feel the effects of it, and that's the only excuse I have (V.3:110).

10. Defense counsel took the position that the testimony of McMakin and Natrass erroneously heard by the jury was of a devastating nature and asked for a mistrial (V.3:111). The motion for mistrial was denied by the Court (V.3:111).

11. Subsequently, the government asked to withdraw Exhibits 14-4, 5, 6, 7, 16-10 and 11 since they were introduced during the erroneously admitted testimony of McMakin and Natrass (V.4:22).

12. The following day during the charge to the jury, the Court gave an instruction asking the jurors to disregard the improperly admitted testimony of both Natrass and McMakin (V.4:25-27), stating that the testimony should not have been admitted and that the Court erred in allowing it to be admitted in this case (V.4:27).

13. The Petitioner was convicted on all counts. On December 14, 1979 his conviction was affirmed by the Fifth Circuit Court of Appeals.



## REASON FOR GRANTING THE WRIT

### THE TRIAL COURT VIOLATED PETITIONER'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL WHEN IT DENIED HIS MOTION FOR MISTRIAL AFTER WRONGFULLY ADMITTING THE TESTIMONY OF TWO GOVERNMENT WITNESSES AND A NUMBER OF GOVERNMENT EXHIBITS INTO EVIDENCE.

After conducting a preliminary inquiry outside the presence of the jury, the Court reluctantly admitted the testimony of Agent McMakin and Gordon Natrass into evidence:

THE COURT: Do you have to have this kind of evidence in the case? It seems to me you have it through Cates and Strickland.

MS. McKENZIE: I won't get a directed verdict if I don't have it, but it's certainly relevant evidence because Mr. Rials' whole defense is he thought there was nothing wrong with what they were doing, he had no intent to do anything, and the coverup certainly shows that this is entirely untrue.

THE COURT: All right, I'll admit it. (V.3:51).

Natrass took the stand and testified that he bought machinery from SEMAC in 1973 and 1974 (V.3:55), but that he never received finder's fees in cash from anyone connected with SEMAC Industries (V.3:57).

Special Agent McMakin testified that he had occasion to speak with a representative of Rials about this case during a meeting on January 30, 1976 (V.3:80). At this time, information was given to him from SEMAC's Attorney Ginsberg, concerning what happened to the proceeds of money received by SEMAC from two Puerto Rican corporations, Construction de Autopistas and Capitol

Construction Company (V.3:80). McMakin was told that the entire amount of money that Machinery Buyers and/or SEMAC Industries received from both Puerto Rican companies, was received by the corporate officers of SEMAC and in turn, immediately turned around and used to pay finder's fees to two individuals; one a Mr. Gordon Fleming, the other a Mr. Gordon Natrass (V.3-81). McMakin testified that he was told by Petitioner's agent, that Natrass and Fleming would deny receiving any finder's fees from SEMAC Industries, and that Fleming could not be found.

Petitioner's counsel renewed each and every objection that he had made during the hearing outside the presence of the jury as to McMakin's entire testimony (V.3:79). At this time the Court stated:

> I have overruled your objections but I want Ms. McKenzie to know that I do it with some misgivings. (V.3:80).

After the testimony was heard by the jury and after various finder's fee checks and vouchers were introduced into evidence by the Government the Court stated at Petitioner's vicarious admissions through the statements made by Ginsberg to McMakin should not have been admitted into evidence (V.3:107):

> I am convinced, the more I think about it, that there is no way in the world that that evidence should be admissible and I have to try to figure out some way to instruct the jury to disregard it. (V.3:107).

The Court further stated:

> The question is purely and simply whether or not Ginsberg was the agent of Mr. Rials when that statement was made, or was he the agent of the corporation, thus those statements would not be chargeable to Mr. Rials . . . (V.3:110).



The evidence clearly shows that Ginsberg was the agent of the corporation and not of Rials when the statements were made. The power of attorney form which was signed, indicated that Ginsberg and other lawyers were representing SEMAC Industries before the I.R.S. concerning their investigation (V.3:26). The power of attorney (Government Exhibit 43-1) was signed solely in a corporate capacity and at a time when the I.R.S. was investigating the corporation exclusively (V.3:33). Furthermore, Rials was not given *Miranda* warnings or any other warnings under the regulations of the I.R.S., which would indicate that he, himself, was subject to a criminal investigation (V.3:37). Thus, the statements made by SEMAC's attorney, Ginsberg, during the January 30, 1976, meeting should not be chargeable to Rials.

In many instances, the statement of an agent of a party will be admissible as a vicarious or representative admission of his principal. *See generally*, C. McCormick, Evidence Section 267 at (639-47) (Cleary Ed. 1972). The Federal Rules of Evidence provide that:

> A statement is not hearsay if . . . the statement is offered against a party and is . . . (D) a statement by his agent or servant concerning a matter *within the scope of his agency* or employment, made during the existence of the relationship. (Emphasis added) Fed. R.Evid. 801(d)(2).

In *Laird v. Air Carrier Engine Service*, 263 F.2d 948 (5th Cir. 1959), the Court stated:

> Lawyers can and frequently do make statements which, had the client made them, would be admissible as admissions. Whether they are admissible against the principal depends on the scope of the agent's (attorney's) authority. (At 953).

In *United States v. Dolleris*, 408 F.2d 918 (6th Cir. 1969), the Court stated:

> . . . an attorney, merely because of his employment in connection with litigation does not have the authority to make out-of-court admissions for his client, except those which are directly related to the management of that litigation. 7 Am.Jur.2d Attorneys at Law Section 122 (1963). (At 921).

In the instant case, the power of attorney authorized Ginsberg to participate in a meeting with McMakin, as agent for the corporation, SEMAC. The legal effect of the power of attorney was to allow Ginsberg to represent a corporate entity, in defending itself against a civil and criminal investigation. At this time Rials was not informed that he was a target of the investigation. Therefore, Ginsberg's statements could not be used against Rials. It is clear that Rials, the individual, was not under investigation at the time the statements were made and that Ginsberg represented SEMAC—not Rials.

The cases *United States v. Diez*, 515 F.2d 892 (5th Cir. 1975) and *United States v. Lemlich*, 418 F.2d 212, 214 (5th Cir. 1969) are distinguishable from the case at bar. In both of these cases, the powers of attorney signed were executed solely on behalf of the individual taxpayer charged in the indictment. This is clearly not the situation here.

The Court summarized the issue here very simply: Whether Ginsberg was the agent of Rials or of SEMAC when the statements were made. It is indisputable that Ginsberg was the agent of SEMAC when the statements were made. Therefore, the statements made were not chargeable to Rials and were erroneously admitted into evidence.



The admission of McMakin's testimony, Natrass' testimony and the specific exhibits already mentioned (*supra* at 9) was clearly prejudicial and of a devastating nature, rendering said admissions reversible error.

While the Court stated that this kind of evidence was introduced through Cates and Strickland (V.3:51), it is highly significant that Cates and Strickland were immunized witnesses and were accomplices to the alleged offenses. The Court's charge to the jury included the warning that immunized testimony "should be examined by you with greater care than the testimony of an ordinary witness" (V.4:59) and that an accomplice's testimony "is always to be received with caution and considered with great care." (V. 4:60).

The jury could have chosen to believe the testimony of Cates and Strickland or to disbelieve the testimony of Cates and Strickland in its entirety. The fact that the jury heard corroborating testimony from McMakin and Natrass cannot be wiped out, even by the instruction which was given at the close of evidence. The fact that McMakin is a special agent with the Criminal Investigation Division of the I.R.S. most certainly had the effect of buttressing and corroborating the testimony of accomplices Cates and Strickland, which might have otherwise been disregarded in whole or in part. In this context, it is apparent that the Court's admitted error was prejudicial to Petitioner and deprived him of a fair trial in violation of his Sixth Amendment rights.

Finally, the instruction which was given to the jury at the close of evidence and one day after the inadmissible evidence was heard was insufficient to cure the error which took place. The Court was not asking the jury to disregard one or two prejudicial remarks which were made

during trial, but instead was asking the jury to disregard the *entire* testimony of McMakin and part of the testimony of Natrass, giving the reason that "such information is totally and completely untrustworthy and is not to be considered by you in your consideration of the innocence or the guilt or Mr. Rials in this case." (V.4:26). It is significant that no curative instruction was given directly after the inadmissible testimony was introduced. It is probable that the testimony had already left its indelible mark in the minds of the jurors or that they did not remember the content of the testimony they were to disregard, rendering the instruction to disregard McMakin's testimony meaningless.

As the Fifth Circuit itself pointed out in another context "one 'cannot unring a bell'; after the thrust of the saber it is difficult to forget the wound; and finally, 'if you throw a skunk into the jury box, you can't instruct a jury not to smell it.' " *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962).



## CONCLUSION

Based on the within and foregoing reasons, the conviction of the trial court in the instant case should be reversed.

Respectfully submitted, this the fourteenth day of January, 1980.

GARLAND, NUCKOLLS, KADISH,
MARTIN & CATTS, P.C.

/s/
EDWARD T. M. GARLAND

/s/
JOHN R. MARTIN

/s/
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**CERTIFICATE OF SERVICE**

I hereby certify that I have this date served a copy of the within and foregoing Petition for Writ of Certiorari upon Ms. Gail McKenzie, Assistant United States Attorney, Northern District of Georgia, Atlanta Division, United States Courthouse, Atlanta, Georgia 30303, by depositing same in the United States Mail in a properly addressed envelope with adequate postage thereon.

This the 14th day of January, 1980.

/s/ EDWARD T. M. GARLAND
EDWARD T. M. GARLAND

# APPENDIX

## APPENDIX A

## IN THE UNITED STATES COURT OF APPEALS

## FOR THE FIFTH CIRCUIT

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**No. 79-5096**
**Summary Calendar***

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UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

versus

WILLIAM J. RIALS,
*Defendant-Appellant.*

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**Appeal from the United States District Court for the Northern District of Georgia**

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(DECEMBER 14, 1979)

Before GOLDBERG, RONEY and TJOFLAT, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Fed.R.App.P 34(a); 5th Cir. R. 18.

[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.